

Exhibit H

1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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4 USG CORPORATION,
5 a Delaware corporation, et al., Jointly Administered
Case No. 01-2094 (JKF)
Debtors.

6

7 USG CORPORATION, et al., Civil Action 04-1559 (JFC)
Civil Action 04-1560 (JFC)

8 Movant,

vs.

9

10 OFFICIAL COMMITTEE OF ASBESTOS
PERSONAL INJURY CLAIMANTS,
OFFICIAL COMMITTEE OF UNSECURED
11 CREDITORS, OFFICIAL COMMITTEE
OF ASBESTOS PROPERTY DAMAGE
12 CLAIMANTS AND LEGAL
REPRESENTATIVE FOR FUTURE
13 CLAIMANTS,

14 Respondents.

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before Joy Flowers Conti, District Judge.

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Court Reporter. William A. McKenzie, RMR, CRR
21 1021-A U.S. Courthouse
Pittsburgh, PA 15219
22 (412) 261-6122

23

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

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1 APPEARANCES:

2 For the Debtor: Stephen C. Neal, Esq.
3 Scott D. Devereaux, Esq.
4 For Equity Committee: David Hickerson, Esq.
5 Peter Friedman, Esq.
6 Andrew Sole, Esq.
7 Unsecured Creditors Kenneth Pasquale, Esq.
Committee: Mike Lastowski, Esq.
8 Futures Representative: Jane W. Parver, Esq.
9 Andrew Kress, Esq.
Michael A. Lynn, Esq.
10 Asbestos Personal Injury Nathan D. Finch, Esq.
Claimants Committee: Walter B. Slocombe, Esq.
11 Asbestos Property Damage Mitchell Widom, Esq.
Committee:
12 (Participating telephonically)
13 Owens-Illinois: Katharine Mayer, Esq.
14
15
16
17 For the Debtors: Daniel J. DeFranceschi, Esq.
18 Asbestos Property Damage Chris Ward, Esq.
Committee:
19
20 Futures Representative: Maribeth Minella, Esq.
21 Liske Trust: Randy Videen, Esq.
22 USG Corporation: Suzanne Torrey, Esq.
Stan Ferguson, Esq.
23 Chair of Equity Committee: Thomas Walper
24 USG'S Financial Advisor: Matt Rosenberg
25

1 (Proceedings held in open court; Thursday, October 6,
2005.)

2 THE COURT: This is a hearing on a motion regarding
3 the client questionnaire in the matter of the USG Corporation
4 Jointly Administered at No. 01-2094 in the Bankruptcy Court and
5 present before this court in Civil Action No. 04-1559 and
6 04-1560.

At this time, I'm going to ask that the clerk will call the role of all those here so we have your appearance entered on the record.

10 THE CLERK: Scott Devereaux?

11 MR. DEVEREAUX: Good morning, Your Honor.

12 THE CLERK: Stephen Neal?

13 MR. NEAL: Good morning, Your Honor.

14 THE CLERK: David Heiman?

15 MR. HEIMAN: Good morning, Your Honor.

16 THE CLERK: Nathan Finch?

17 MR. FINCH: Good morning, Your Honor.

18 THE CLERK: Walter Slocombe

19 MR. SLOCOMBE: Good morning.

20 THE CLERK: Mitchell Widom?

21 MR. WIDOM: Good morning, Your Hon

22 THE CLERK: Ken Pasquale?

23 MR. PASQUALE: Good morning, Your Honor.

24 THE CLERK: Jane Parver?

25 MS. PARVER: Good morning, Your Honor.

1 THE CLERK: Andrew Kress?
2 MR. KRESS: Good morning, Your Honor.
3 THE CLERK: Michael Lynn?
4 MR. LYNN: Good morning, Your Honor.
5 THE CLERK: Marla Eskin?
6 MS. ESKIN: Good morning.
7 THE CLERK: David Hickerson?
8 MR. HICKERSON: Good morning, Your Honor.
9 THE CLERK: Ralph Miller?
10 MR. MILLER: Good morning, Your Honor.
11 THE CLERK: Is there anyone else who is present and
12 would like to enter their appearance on the record in the
13 courtroom?
14 On the phone, if you could please identify yourself
15 when I call your name and at the end if there are any
16 additional parties joining us, please identify yourself.
17 Andrew Sole?
18 MR. SOLE: Yes.
19 THE CLERK: Mike Lastowski?
20 MR. LASTOWSKI: Present.
21 THE CLERK: Stephen Vogel?
22 Chris Ward?
23 MR. WARD: Present.
24 THE CLERK: Katherine Mayer?
25 MS. MAYER: Yes, I'm here.

1 THE CLERK: Mary Beth Minella?

2 MS. MINELLA: Present.

3 THE CLERK: Peter Friedman?

4 MR. FRIEDMAN: Present.

5 THE CLERK: Randy Videen?

6 MR. VIDEEN: Yes.

7 THE CLERK: Peg Brickley?

8 Thomas Walper?

9 MR. WALPER: Good morning, Your Honor.

10 THE CLERK: Matt Rosenberg?

11 MR. ROSENBERG: Present.

12 THE CLERK: Suzanne Torrey?

13 MS. TORREY: Present.

14 THE CLERK: Daniel DeFranceschi?

15 MR. DeFRANCESCHI: Present.

16 THE CLERK: Pat Evans?

17 Reid Snellenbarger?

18 Is there anyone who would like to enter an
19 appearance whose name I have not called?

20 THE COURT: The Court notes that of those who are
21 scheduled to appear, that Mr. Vogel, Ms. Brickley, Pat Evans
22 and Mr. Snellenbarger are not on the line.

23 Before the Court today is the debtors' motion for
24 approval of the debtors' sample plan and questionnaire.

25 The parties have submitted a joint report which the

1 Court has reviewed. In that report, each party goes through
2 their agreements and disagreements. What I would like to do
3 is to address three issues today. One, I want to go over what
4 we discussed at the last hearing and that was how the Court is
5 going to handle the motion with respect to the sampling plan.
6 I want to review the questionnaire. And then we need to
7 examine the issues relating to the databases that have been
8 raised to see how that would affect the questionnaire and the
9 process going forward. So those are really the three matters.
10 And then procedurally we're going to have to address at the
11 very end timing in terms of the process to conclude this
12 discovery phase and then how to proceed from that.

13 MR. DEVEREAUX: Good morning, Your Honor. Scott
14 Devereaux on behalf of the debtors.

15 As the joint report makes clear, we did make some
16 progress in areas that you laid out with the questionnaire and
17 sampling plan and timing, actually, for the overall discovery.
18 There are some issues that remain in dispute to be resolved
19 today. There is one additional agreement that we were able to
20 reach relating to timing after the joint report is submitted
21 that I'd like to apprise the Court of that relates to the time
22 needed to analyze the questionnaire and supporting documents.

23 THE COURT: You were a couple months off between
24 parties.

25 MR. DEVEREAUX: We were between March and May --

1 March and June. We settled around May.

2 THE COURT: That's where I was coming at anyway.

3 MR. DEVEREAUX: Glad we got there before you did,

4 Your Honor. The way the agreement was reached is as the joint
5 report makes clear, if as a result of this hearing today we
6 are able to, the debtors are able to distribute the
7 questionnaire to their sample of claimants by October 20th,
8 then we've agreed that the personal injury claim superseding
9 it will respond and provide the detailed questionnaires back
10 by January 9th. At that point, Rust Consulting, the document
11 processing group that is handling the questionnaires, will
12 scan the questionnaires themselves and any documentation
13 submitted with them, be they medical records or depositions
14 and such, and then distribute it to all the parties. Rust
15 tells me that that will take -- they'll get it done by January
16 20th.

17 THE COURT: How does the question on the database
18 affect this sampling plan? How is that information going to
19 go out? That was raised by --

20 MR. DEVEREAUX: I don't think it does. We've had
21 different versions of this database because the CCR, which is
22 the compiler of the database, updates it over time.
23 Initially, in 2001, when the case was filed, a copy of that
24 database was provided to the ACC. Later, in 2002, the FCR was
25 appointed by Judge Wolin and a copy was provided to them, but

1 it was a subsequent copy as of that date, so they're
2 different. We had endeavored following the June hearing to
3 try and get everybody on the phone with CCR, Navigant, their
4 data processing consultant, to get everybody what they wanted
5 or what they thought they needed. We tried to do that.
6 Apparently, we didn't. What we did was we got from Navigant
7 for the parties at the ACC and CCR's requested databases as of
8 January 2002 and May of 2002 because I think, and they can
9 speak to this, I think they wanted to compare them and see
10 what kind of changes are happening over time.

11 Those went out in the form that I think they were
12 asked for, sort of standard CCR format, but there was a period
13 at the end that Navigant didn't know or didn't understand to
14 be part of the request from the 2001 time period. So we've
15 asked Navigant to get that stub period for the ACC and all the
16 parties in this case.

17 There's still concern that the data isn't matching
18 because we keep generating new databases and so what they have
19 asked for in a recent conference call, and we've agreed to,
20 we're just going to have our expert, Lexecon, make a copy of
21 their database and provide it --

22 THE COURT: I think everybody has to have the same
23 database because, otherwise, you cannot -- it would be like
24 comparing apples and oranges.

25 MR. DEVEREAUX: That's right. It's such a

1 voluminous amount of data that absent doing it that way, it's
2 hard to really know whether it's really precise or not. That
3 solves the problem as far as making sure everybody is on the
4 same page. We're going to give them a copy of ours, if they
5 or any other parties want information from Navigant.

6 THE COURT: That was raised from the future
7 claimants.

8 MS. PARVER: Yes, Your Honor.

9 THE COURT: Does this satisfy you?

10 MS. PARVER: Well, Your Honor, what Mr. Devereaux
11 agreed to on Monday of this week was finally to produce, as he
12 said, the exact copy of what they're working from. We have
13 not gotten a date as to when that will be supplied as well.
14 There is an outstanding request that we've not heard back from
15 the debtors with certainty because they have asked for another
16 meet and confer on a variety of discovery issues which they
17 have scheduled -- they couldn't do it this week, it's October
18 11th. And there are outstanding requests for data
19 dictionaries and listings of fields in the database and codes
20 and things like that, so we're waiting to hear back with
21 respect to that, Your Honor, as well as when Navigant will
22 produce --

23 THE COURT: To the extent the database is prepared,
24 anything like that to help assess the information, that should
25 also be provided.

1 MR. DEVEREAUX: We are providing it. We are in the
2 process of collecting over one million documents. We have
3 produced half a million. There are lots of discovery issues
4 we're discussing. This is one of them and we're responding.

5 THE COURT: We have to get through this phase with
6 the claimants because this database is such a critical issue
7 and their experts are going to need to look at it as well as
8 yours.

9 MR. DEVEREAUX: We'll get it to them this coming
10 week.

11 MR. FINCH: May I briefly be heard on the
12 clarification of the database point, and then the timing
13 agreements that were reached?

14 Our view, and as I think the Court recognizes, that
15 they send out the sample to 2,000 claimants, if it turns out
16 that the database they are using has errors in it, and if it
17 turns out for some reason their sample is nonrepresentative,
18 we will attack that with expert testimony at the estimation
19 hearing at the appropriate period of time. I don't think
20 fixing on the final version of the database necessarily should
21 hold up sending out the questionnaire to the claimants.

22 On the timing of that, my understanding is Rust
23 will send out 2,000 questionnaires in whatever format the
24 Court finally orders and my agreement with them as to timing
25 is on behalf of ACC. I don't represent the individual

1 claimants and their individual circumstances. If somebody's
2 files were wiped out in Hurricane Katrina, I can't control
3 whether or not they can get stuff back in two months or not.
4 People may come in with their own timing issues. But if Rust
5 gets the questionnaires out by October 20th, then two and a
6 half months to January 9th is our best estimate of the time
7 frame to complete the questionnaires.

8 I know from the W.R. Grace case, there are still
9 law firms who have claims on filings with Grace at the time
10 they went into bankruptcy who hadn't received questionnaires
11 from Rust yet. That was a month after they were supposed to
12 go out, so all the timing deadlines are from the time the
13 questionnaires go out, and then the time to -- the time after
14 which to analyze whatever Rust gets, that has to be a
15 four-month clock that starts when Rust produces all that stuff
16 to the parties, not some fixed, arbitrary date which may or
17 may not be met by Rust. That's what I wanted to be clear on
18 in terms of the agreements and the timing.

19 MR. DEVEREAUX: Your Honor, there are lots of
20 reasons why we chose a sample of 2,000 rather than trying to
21 send out questionnaires to everybody, and to avoid those kinds
22 of problems, we're dealing with a much, much smaller sampling
23 than Grace. But the agreement, as Mr. Finch says, once the
24 materials are received by Rust, they will scan it and get it
25 distributed, which they tell me they'll be able to do by

1 January 20th, and four months from that date, then by the
2 parties' agreement, is the time sufficient to analyze fully.

3 THE COURT: My preference is to have a firm date.

4 If there's a problem with that date, then parties need to file
5 a request to extend the date because at that stage you,
6 hopefully, will have an assessment of how much additional time
7 might be necessary, or if there's additional sampling that
8 needs to be done, we'll have to address that at that time, if
9 it's necessary. If we have a firm date to work against, then
10 there's a reason to come back to court and I have an
11 opportunity to monitor the progress of the discovery.

12 MR. DEVEREAUX: Along that line, Your Honor, then I
13 would propose --

14 THE COURT: You have to file something before the
15 close of the period so that I'm alerted to it, and then
16 everybody can be heard and then we can all get on the line.
17 We probably can do that by conference call, if it's just a
18 question of trying to determine what the appropriate date
19 would be.

20 MR. DEVEREAUX: For today's scheduling order, then
21 I would propose that if those dates of October 20th and
22 January 9th -- which have been agreed to by the parties -- are
23 acceptable to the Court, then the date of January 20th would
24 be the date by which Rust and the debtor would make sure that
25 all information received with the questionnaire is distributed

1 to all parties. And the period --

2 THE COURT: Rust will be scanning it within that
3 period of time?

4 MR. DEVEREAUX: Correct, Your Honor. And
5 distributing it by the 20th, and that the parties will then
6 have up and to and including May 20th for the purpose of
7 analyzing that data.

8 MS. PARVER: Your Honor, if I may, could we have
9 the order reflect they're going to be distributing it
10 electronically in the forms agreed to by the parties? There
11 have been some disagreements -- I'm sure you'll be shocked to
12 hear -- on other production issues as to what form people can
13 use, et cetera, with all these different and technological --

14 THE COURT: I'm going to ask the debtor to prepare
15 an order with respect to these dates, share it with the other
16 counsel and make sure that we've picked up the issues that
17 you've addressed with the electronic problems. If there's a
18 problem with the form of the order, we can have a quick
19 conference call and resolve any issues, but, hopefully, that
20 you're working together and everyone has a mutual goal of
21 bringing this process to a conclusion, agree on appropriate
22 language, and then I'll have an order that everyone has agreed
23 to and I'll be able to sign it.

24 MR. DEVEREAUX: We'll do that, Your Honor.

25 So, that's the timing issue. Now, we don't have a

1 close of fact discovery deadline yet.

2 THE COURT: I've dealt with the data issue and
3 that's something that is going to be handled by the debtor,
4 making sure that everybody has the same database so that when
5 you're doing a review or having the material reviewed, you'll
6 have that.

7 MR. FINCH: Basically, what we want is whatever
8 database they use to draw their sample of 2,000, that's the
9 exact same thing they produce to us.

10 THE COURT: That's what they said they would do.

11 MS. PARVER: They said this week they were going
12 to.

13 MR. DEVEREAUX: I said next week, this coming week,
14 but you'll have it soon.

15 THE COURT: So the database will be produced.

16 We've agreed on the timing issues and that the debtor will
17 produce it with respect to the portion of the motion that
18 addresses the sampling plan.

19 At the last hearing, I told the parties that when
20 discovery hasn't been completed, it was very difficult for
21 this Court to try to assess in the absence of a complete
22 presentation the legitimacy of the sampling plan and approving
23 it, so at this point, the Court would not approve the sampling
24 plan. That's a matter that the debtor has to review with the
25 experts that it's going to be relying on, then we'll have an

1 opportunity when everybody has the database, the analysis, the
2 expert reports, then we'll be able to have an appropriate and
3 full record before the Court in order to make an appropriate
4 determination with respect to that issue. So that's clear on
5 the record.

6 Now, with respect to the questionnaire, I think the
7 best thing to do is to pull out the form of the questionnaire
8 and just go through those areas of the questionnaire one by
9 one that the parties dispute and I'll address each one as we
10 go through.

11 MR. DEVEREAUX: One clarification on the sampling
12 plan before we move on because we have, as a result of some
13 comments or criticisms by the FCR, made some changes in the
14 sampling plan. And I understand from the last hearing and
15 what Your Honor just said that you aren't blessing it as being
16 adequate to do what the debtors seek, but that you are,
17 instead, permitting us to take discovery of 2,000 people and
18 we choose them how we choose them. Later on, it's subject to
19 criticism and debate.

20 THE COURT: It's too difficult when you don't see
21 what the results are. What comes back, if you need more
22 sampling because not enough have responded, that's a concern
23 as well. So until it's concluded, I can't make the final
24 determination about the appropriateness or the weight to be
25 given to the sampling plan and the expert reports derived from

1 it, so that's clear on the record.

2 That's the last issue for today because what I'm
3 going to do is we'll set a status conference at the close of
4 this discovery period and by the close of the discovery
5 period, it will be closed for everybody, so if there are these
6 other discovery issues out there, I want to make sure
7 everything has been addressed and resolved. Once we know that
8 this discovery is concluded, at that stage when I ask each
9 party to disclose who their experts are going to be, then
10 we'll set the time frame for the filing of the expert reports,
11 the responsive reports, replies and set up a Daubert hearing.

12 MR. DEVEREAUX: At the end of the May 20 time
13 period we'll close discovery.

14 THE COURT: We'll move toward closing discovery.

15 MS. PARVER: I understand, Your Honor, but I
16 understand that Your Honor is going to give us an opportunity
17 today to speak to what we believe should be the --

18 THE COURT: -- the appropriate cutoff for
19 discovery. I understand. Whatever that date is, it's going
20 to be -- we have a cutoff date for the sampling.

21 MR. FINCH: There are lots of other discovery
22 issues.

23 THE COURT: We'll address that, too.

24 MR. DEVEREAUX: Your Honor, on the questionnaire,
25 we have made a lot of -- the debtor has made a lot of changes

1 to the questionnaires since the version that was submitted a
2 couple weeks ago in the meet and confer process.

3 THE COURT: Is this different from the one that --
4 do I have the most recent one?

5 MR. DEVEREAUX: You have the most recent one, Your
6 Honor. But in that, as opposed to two weeks ago when we were
7 here taking the Court's admonitions to heart, we've eliminated
8 medical records for mesothelioma claimants, voluminous
9 records. We have eliminated any requests for most medical
10 records for cancer claims, lung cancer or other cancer claims,
11 focusing instead simply on records related to the diagnosis
12 itself. We have deleted any request for residences, even
13 though that can play a part. We've deleted a request that the
14 claimants execute a HIPAA form so we could have access to
15 their medical records. We've reduced the amount of
16 information we asked for as to the doctors who treat various
17 claimants. We've deleted any requests that claimants identify
18 distributors of products that they claim to have been exposed
19 to, and we've removed any requests that the claimants identify
20 the debtors. We've made a lot of changes, including some
21 small verbiage changes to try to make the form clearer at the
22 request of other parties.

23 THE COURT: It's clear to this Court that an
24 average person is going to have to have counsel assist them in
25 this, and I'm assuming that all of the claimants who receive

1 this form are represented by counsel. Does this go to their
2 counsel?

3 MR. DEVEREAUX: It does, Your Honor. Debtors have
4 compromised where they can, but we still have a methodology
5 that we intend to pursue and which we understand the Court is,
6 going to allow us. It involves presenting evidence on the
7 merits of these claims and that the debtor and the equity
8 committee and every other stakeholder in this case, but for
9 the ACC and the FCR, want to be sure that what is clearly
10 suspect and what some argue fraudulent claimant behavior in
11 the asbestos tort world does not get propagated in this
12 courtroom. And in order to do that, Your Honor, we need to
13 try to develop or we're going to put down evidence before this
14 Court that identifies who it is that is actually sick, and in
15 order to do that, we need the medical records of those
16 individuals. The ACC's response is to say, well, we'll just
17 give you the ILO x-ray reading form and not the x-ray itself
18 and that will be sufficient. But it won't, Your Honor,
19 because that would require us to accept what we believe are
20 highly suspect diagnoses of doctors or mass screening
21 companies and turns the adversarial nature of the litigation
22 on its head. So we actually need the medical records that
23 they claim to rely on as evidence of disease. We also want to
24 identify those individuals and all stakeholders want to
25 identify those individuals that the debtors actually cause --

1 THE COURT: I want to be clear here because I am
2 not adjudicating any individual claimant's claim in this
3 process because I'm not going to adversely affect anyone's
4 rights without their being present and able to be heard and
5 having a full trial as they would be entitled to.

6 MR. DEVEREAUX: Nor are we asking you to, Your
7 Honor. But what we are asking, we'll focus on a sample and
8 some information about the claimants that we learn from that
9 sample and extrapolate as a whole so the Court, as Your Honor
10 has indicated, it would be able to make some general
11 assessments about what types of cases have merit and what
12 types of cases in the aggregate don't, and that that's the
13 only way to yield an estimate of the debtors' liability.

14 So that's what our process is designed exactly to
15 do. We haven't adjudicated anybody's rights and are not
16 proposing to in this courtroom, but we do need and propose
17 getting a body of information by which the Court can make some
18 assessments about what kind of claims the debtor generally
19 faces and will face.

20 Another piece of information that we ask for and
21 it's in dispute is -- we want to pay those individuals who
22 we've actually caused their injury, if they're actually
23 injured, but the second question is did the debtors cause it?
24 And so we need to know, though, the when and the where and the
25 how they claim they were exposed to US Gypsum

1 asbestos-containing products. And that's the information that
2 the questionnaire designs to seek regarding where they worked,
3 what they were exposed to, for how long. And they are all
4 represented by lawyers, and this is sort of bedrock basic
5 information for any tort claim and important for this
6 estimate.

7 Finally, there are really three areas in dispute in
8 the questionnaire. The final area relates to other legal
9 actions or bankruptcy claims that have been made. And it is
10 the debtors' view that we want to make sure that people are
11 fairly compensated in this bankruptcy, but that no one
12 receives a disproportionate share at the expense of all the
13 other stakeholders who are here as well making claims on the
14 estate. So it is incumbent that the debtor be allowed to find
15 out what the tort settlement history was for these claimants.
16 And all of this information, Your Honor, is fundamental to
17 tort claims and all of it is clearly relevant and discoverable
18 and, in fact, Judge Fitzgerald in Grace has approved already
19 that this information be collected.

20 The January 9th date is the date the parties agreed
21 to to return the questionnaires in this matter and that date
22 was requested by the ACC and FCR, and we acceded to it. It
23 wasn't requested by happenstance. The Grace case management
24 order requires that all 118,000 of the claim forms going out
25 or questionnaires going out in that matter be returned on

1 January 12th. And the information requested in the Grace
2 claim form is very similar to the information that the debtors
3 are seeking here, and they're already going to be collecting
4 that information and essentially asked for January 9th so they
5 can all do it at the same time.

6 So, Your Honor, there is no real claim that this is
7 relevant or likely to lead to discoverable, admissible
8 information. I would submit, Your Honor, there's no other
9 objection regarding the questionnaire that's pending before
10 Your Honor today. The questionnaire that the debtors propose
11 to circulate imposes no obligation on the FCR or any of the
12 individuals or interests that the FCR represents. Nothing is
13 asked of them. The ACC, obviously, as a representative of
14 present claimants has a role in this because the argument will
15 go to their people, but they say in the joint report at Pages
16 3 and 4, bottom of Page 3 and 4, that those claimants they're
17 talking about, the personal injury claimants -- I'm quoting
18 from the bottom of Page 3: Those claimants and their
19 attorneys are not bound by the objections that counsel for the
20 ACC may make and have the right to advance their own
21 identical, different or additional objections. It is
22 impossible at this juncture for counsel to the ACC to know
23 whether compliance with the questionnaire is unduly burdensome
24 in a particular case. I close quote there.

25 This is reiterating something Mr. Finch said today.

1 We don't represent the individual claimants and, as a result,
2 they aren't claiming that this is burdensome. If some lawyer
3 who does represent a claim wants to come in and say, despite
4 the fact that I have a claim against USG in this bankruptcy,
5 it's unfair to ask any information about what illness they
6 have, about some evidence showing it, how they're exposed to
7 USG and other asbestos-containing products and some
8 information regarding it and what their other experience is in
9 suing people who they claim have also injured them. If they
10 want to come in and make that argument, they can, but I don't
11 understand the ACC today to be saying that the one and a half
12 percent sample with a questionnaire on this basic information
13 is burdensome. But if they did, Your Honor, that objection
14 wouldn't be well taken. The approach that the debtors have
15 taken in asking for a sample of 2,000 has rightly been
16 approved in other cases, like Grace, of sending out a
17 questionnaire to 118,000 people. Obviously, this debtor is
18 very concerned about making this efficient, is not interested
19 in making it burdensome and hasn't.

20 We've pared down this questionnaire taking out
21 things that are, in fact, relevant to the determination, but
22 which, in the interest in compromise and an efficient
23 estimation hearing, we've decided to forego. We have boiled
24 this down to: Are you sick? Did we cause it? And what in
25 your other experience with others you've claimed caused your

1 injury? That's what the set of objections that remain from
2 the ACC relate to, those three types of issues.

3 There's one issue that I would like to raise, Your
4 Honor, about the questionnaire. One clarification that I
5 would propose today and that is on Page 3 of the questionnaire
6 in the instruction section. It's something that for
7 clarification sake should be done. I don't know whether there
8 will be a problem. It's Instruction 10, which says that
9 instead of originals, you may submit photocopies. And it goes
10 on, of any and all documents that the questionnaire requires.
11 Obviously, a photocopy of an x-ray is not helpful to us, you
12 can't read it. We don't want anyone confused that photocopies
13 of x-rays are acceptable for x-rays. We need the original
14 submitted for the purpose of reading them. Judge Fitzgerald
15 in Grace gave the debtors access, upon request, to the
16 original x-rays. We're obviously requesting a very small
17 amount.

18 So, for clarification, I would propose after the
19 word "requires," we insert "other than nondigital radiographic
20 evaluations, such as x-rays or CT scans." Obviously, if
21 they're digital, then the copies are as good as the originals.
22 A lot of x-ray scans now are digital.

23 That one clarification of the questionnaire I think
24 is appropriate. Otherwise, Your Honor, I believe that in
25 passing the test that the Court set out for us, is this

1 designed -- taking a broad view of it, is this designed to
2 discover admissible information? I think the answer is
3 undeniably yes. Is it burdensome, if there was even a
4 burdensome objection, and the answer is absolutely not. It is
5 a very focused sample and a very streamlined questionnaire.

6 Now, I can, if you would like, Your Honor, start to
7 go through the items one at a time that are in the joint
8 report.

9 MR. FINCH: May I be heard before we do that?

10 THE COURT: Yes.

11 MR. FINCH: The debtor has stated both just now and
12 in its papers that what it seeks to do here is estimate the
13 aggregate liability for plan purposes. It's not either
14 adjudicating the merits of 2,000 individual claims, nor is it
15 estimating, asking this Court to estimate for any purposes of
16 allowance whether or not Claimant X has a valid claim or not.
17 And that's the context in which you have to view this
18 discovery. Almost all of their discovery beyond what disease
19 do you have, were you exposed to USG products and some basic
20 information about the claim goes to the type of evidence that
21 you would put on by expert testimony to impeach or
22 cross-examine or use in a trial of that claim. And think
23 about what you're asking. These are people who don't have a
24 date by which they have to submit expert reports. They're
25 prohibited by the automatic stay from just doing discovery

1 against USG. They are prohibited from trying their cases
2 against USG unless they successfully lift the stay motion, and
3 they are claimants who have filed claims against USG prior to
4 going into bankruptcy.

5 Most of the information sought by this
6 questionnaire goes to the specific facts of each individual
7 claim. For example, name the other defendants you were
8 exposed to. Well, the law is pretty clear that you can
9 recover from more than one asbestos defendant. The test is
10 cumulative exposure to asbestos and the test is significant --
11 is a particular exposure a significant contributing cause?
12 And there's expert testimony admitted every day in courtrooms
13 across the country that any identifiable exposure to asbestos
14 can be a significant contributing cause to the claimant's
15 injury. So once you have some evidence of exposure to USG
16 products, how are they going to have admissible testimony from
17 somebody that says, okay, I've looked at this file and in my
18 view, I'm an expert doctor, I'm an expert industrial
19 hygienist, this guy doesn't have sufficient exposure to USG
20 products to have a valid claim. Well, the plaintiff doesn't
21 have the opportunity to put on his own expert to counter that.
22 The plaintiff isn't able to do discovery from USG to say,
23 produce a list of every single place where your products were
24 sold that I worked, that I particularly worked at. The
25 recoveries from other defendants aren't relevant to the claim

1 against USG.

2 It's very typical for a construction worker or for
3 any other type of claimant, for that matter, to be exposed to
4 the products of very many companies. Think about it from your
5 own personal experience. If law books were
6 asbestos-containing products and you were asked, identify
7 every different type of law book you were ever exposed to, you
8 can say, I know I worked with West Reporters, I know I worked
9 with Colliers, I know I worked with Lexis. People filed
10 complaints based on a good faith belief that they were exposed
11 to joint compound if they were a construction worker, but they
12 may not have done the discovery that sort of links that up,
13 therefore, I don't see how individualized discovery into the
14 particulars of each of these 2,000 claims could possibly lead
15 to admissible evidence as to the merits of those claims.

16 Now, they have said in repeated submissions they
17 want to litigate sort of five big issues. The first of those
18 issues is does chrysotile asbestos cause mesothelioma? I
19 think that is an issue that does not need the particular type
20 of discovery. They can put on an expert to say mesothelioma
21 cannot be caused by our type of chrysotile and ACC and FCR can
22 put on experts that say they do. But once you get beyond that
23 and you start saying, well, was this particular claimant
24 exposed to enough USG asbestos versus this other USG other
25 different product, you're inextricably bound up in evaluating

1 the merits of that particular complaint. I understand the
2 Court is not doing that.

3 The second issue they want to litigate is can you
4 have lung cancer attributed to asbestos exposure without an
5 underlying diagnosis of asbestosis? There's medical debate
6 about that. I think the greater weight of the medical
7 authority is on the side that you can have lung cancer without
8 underlying asbestosis, but the questionnaire says, do you have
9 lung cancer and is there a doctor that says your lung cancer
10 is caused by asbestos exposure? Also, do you have asbestosis
11 is sufficient for them to make whatever arguments they choose
12 to make based on that fact.

13 The third issue they want to litigate is can any
14 type of other cancer, which is sort of shorthand to
15 gastrointestinal type cancers, be caused by asbestos exposure?
16 Again, that is an issue that can be litigated based solely on
17 the documents in the responses in the questionnaire.

18 The fourth issue is their contention that you need
19 certain levels of pulmonary function tests to have a valid
20 claim and their contention that there are certain doctors who
21 are unreliable. The questionnaire that we have -- the
22 questionnaire, if the Court were to accept our main
23 objections, the questionnaire that would be left would
24 absolutely allow them to make whatever arguments they choose
25 to make about the credibility of certain doctors, and you

1 don't need to go out and review individually 1,000 x-rays to
2 make those assessments and determinations. They can say that
3 20 percent of the claimants have an x-ray read by one of the
4 doctors involved in the silicone litigation. Now, inquiry
5 about whether or not those claimants may go out and get
6 another doctor to read their x-ray, they certainly don't have
7 the opportunity -- they don't have any obligation to put on
8 who was your expert witness against USG right now, but they
9 can make whatever arguments they choose to make based solely
10 on who is the doctor that read your x-ray? What does your
11 x-ray show? What are your pulmonary function tests? The rest
12 of it, I suggest to the Court, is cumulative, not likely to
13 lead to admissible evidence. And in any sort of discovery
14 issue, it's a balancing test. Will the additional information
15 be at all helpful or relevant or useful in a global asbestos
16 estimation trial.

17 And finally on the exposure information, Your
18 Honor, it's my view that once you get beyond, do you have
19 evidence of exposure to USG product and describe the type of
20 evidence that you have, you're inextricably caught up in
21 individualized, particularized determinations. We want you to
22 estimate this claim is not a valid claim. I don't see how any
23 expert can testify when there has been one side of discovery
24 for the plaintiffs aren't coming in with their own individual
25 experts or their own testimony or the testimony of evidence

1 that the plaintiffs' lawyers would choose to present at a
2 trial. How could you have admissible testimony about whether
3 or not there's sufficient exposure in that particular case or
4 that group of cases? That's sort of the basis for my
5 objections on the relevance of other defendant exposure
6 information.

7 And then finally, as to the recoveries from other
8 defendants, what we are estimating here is several share of
9 USG's liability. The fact that somebody might have collected
10 \$100,000 from Owens Corning or \$3,000 from Manville and
11 \$1 million from a total of 40 defendants says nothing about
12 what is the value of the claim worth against USG. If we're
13 going to try these cases to judgment, every single one of
14 them, then USG might get a setoff for the amount that
15 plaintiffs have collected by settlement or judgment from other
16 defendants, but that's not what we are doing here. There's no
17 sort of absolute value for an asbestos personal injury claim.
18 Unless the USG proposes to use some kind of judgment average
19 by taking a sample of cases to judgment, the ones that are
20 indisputable product ID and indisputable mesothelioma, then
21 evidence from other people is irrelevant because these cases,
22 90 percent of them settle, they settle historically,
23 regardless of whether USG is backing the tort system or
24 whether it is a trust that is defending them. There is not
25 enough courtroom time in every court in the United States to

1 hear them all. I submit that other settlement information is
2 totally irrelevant to the estimate of liability here. Can't
3 possibly be. It's oftentimes never discoverable, even if the
4 case goes to verdict.

5 THE COURT: Your position would be that if a
6 company is going to settle a claim, that it would not have
7 inquired about if there's been other settlements in that claim
8 and then factor that in in terms of the value that they might
9 be offering, as well as the other party?

10 MR. FINCH: It wouldn't have the right to get that
11 discovery. At most, if there was a judgment, it would be
12 entitled to know what is the total aggregate amount of
13 settlements you have gotten from other defendants, then set
14 that off against the judgment. But in settling the cases, it
15 is very, very rare that courts would permit one defendant to
16 learn in discovery all the settlements the plaintiff has
17 recovered from other defendants. A typical settlement
18 agreement contains confidentiality agreements that prohibit
19 that. Indeed, many USG agreements have provisions like that.
20 And in evaluating the liability, the Court has to remember
21 that each company is paying its own several share, they don't
22 get together and know with perfect knowledge what someone has
23 recovered from everybody -- everyone else. I submit that has
24 no bearing at all on the estimation of USG's liability here.

25 If you want to go through sort of objection by

1 objection, I think now is the time to do it, but I wanted to
2 make sure you understood our basic position on why the
3 information we object to is not relevant. What you're talking
4 about is a global estimation or estimation of the life size of
5 liability in the aggregate. If it were going to estimate
6 2,000 cases one by one, then it's a totally different ball
7 game. I think you have to allow the claimants to do
8 individual discovery against USG, you have to give them a much
9 longer time frame to do that discovery, and then you would sit
10 here and say, individually evaluate 2,000 cases.

11 THE COURT: My understanding of this questionnaire,
12 the use that it's going to be put to is that the debtor has
13 experts, it has sampling, it's going to input this data and
14 based on the data that is received, it's going to come up with
15 an estimation that it's going to present to this Court. And
16 then the debtor is then going to try to convince this Court
17 through expert testimony that the sampling was valid as to
18 whatever the range would be. But it would not require this
19 Court to go through each of the 1,000 or 2,000 claims that are
20 going to be reviewed and make a determination on a
21 claim-by-claim basis. It's going to be in the aggregate and
22 it's likely to be that there's going to be some range that
23 would be reflected. But that's a decision I cannot make in
24 terms of whether it's going to be accepted by the Court, or if
25 it is accepted, whether it's going to be in full weight, less

1 weight, minimum weight. You have a lot of arguments that
2 might go to the weight as opposed to whether the evidence
3 itself would be admissible. And in discovery, my philosophy
4 of discovery is that relevancy is in the eye of the beholder,
5 to one side it's absolutely irrelevant and to the other side
6 it is relevant. And in discovery, the one who wants it is the
7 one that I generally favor in terms of the relevancy argument.
8 So I have a very broad view of relevancy because if I
9 constrict relevancy, it may impede the ability of one party or
10 the other to have an opportunity, fair opportunity to present
11 their case to the Court.

12 So, with that in mind, I am going to permit the
13 questionnaire. I am going to permit an inquiry and an
14 obtaining of documents that you feel would not be relevant.
15 But the relevancy here, I'm going to go in favor of the debtor
16 who is seeking the information.

17 That doesn't mean I'm going to permit everything.
18 We need to go through some of these things and look at each
19 one of them.

20 MR. FINCH: There are my relevance objections, Your
21 Honor, but there's also a burden objection. It's not a burden
22 on the individual claimant objection I'm raising, it is a
23 burden on the parties to the estimation proceeding which is
24 that proceeding -- it is one thing for them to do a sample of
25 2,000 claimants and get certain information, but once they

1 start asking for certain categories of additional documents,
2 like every potential co-worker deposition that might be
3 relevant to a particular claim, I mean plaintiff lawyers
4 haven't decided what evidence they would put on against USG in
5 a trial, they have no obligation to do so unless and until the
6 Court lifts the stay and says you have a trial date of such
7 and such a time and you have to go prove up your case.
8 Typically, they would decide what evidence they're going to
9 put on as to exposure when they have a discovery schedule that
10 says you have to produce that evidence.

11 THE COURT: The problem that you have, if you look
12 at -- go back to the case, you have claimants who have filed
13 claims in this case, the bankruptcy case, they've put their
14 physical circumstances at issue. If they were going to be
15 proceeding, this is the very type of information that the
16 debtor would be able to get in discovery. It doesn't matter
17 that it's going to be admissible or not admissible. It's a
18 question of getting information in discovery so that they can
19 make some assessments, whether it's ultimately admissible or
20 not admissible is not the question.

21 MR. FINCH: But it's one side of discovery. The
22 discovery, the debtors are taking discovery from the
23 plaintiffs and they're not allowing the plaintiffs to take the
24 reciprocal discovery from them where each plaintiff would
25 serve the debtor would document requests and interrogatories

1 that relate to that particular guy's work history, where he
2 might have been exposed to their products. That, as I
3 understand, is not what the Court is allowing to go on here.
4 Because, otherwise, you're talking about --

5 THE COURT: If you want to look at some of those
6 things, you're free to look at it.

7 MR. FINCH: The committee and the FCR will look at
8 that type of thing --

9 THE COURT: It's just looking at it in general.
10 What I want to say is this is not something where I'm going to
11 go and say for each claim -- estimate each particular claim.
12 What I'm going to do is look at the claims in general. There
13 are going to be certain assessments that will be made by the
14 experts relative to that type of information that has been
15 obtained. I'm going to look at that and then make a
16 determination whether it's valid; if it is valid, how much
17 weight should it be given.

18 MR. FINCH: But the experts will have inevitably
19 been basing their opinion on judgments about what happened for
20 each individual claim, and I believe that can't possibly be
21 admissible unless the other side, i.e., the plaintiffs have
22 produced their expert reports and have produced to the spirit
23 what would be required -- what they would put on at trial, and
24 that's not permitted here, so, therefore, I don't see how this
25 can lead to admissible evidence. I understand your views on

1 relevance and discovery. We will make these --

2 THE COURT: We need to move on because I've made my
3 decision. I've heard your argument and we'll move on because
4 I think we're going back over the same issues. I think what
5 we need to do is spend what time we have so that we can
6 finalize the form of the questionnaire. The issues that you
7 raised I'll certainly entertain at the appropriate time
8 because it is either going to go to whether or not the process
9 is flawed and not permissible or go to the weight. So I'm not
10 saying that I'm not going to hear your arguments, it's just I
11 think that issues you're raising we've already been over and
12 I've resolved, so we're going to move forward with the
13 questionnaire.

14 MR. FINCH: A question by question analysis.

15 MR. DEVEREAUX: The first one I have is question
16 No. 6 on the questionnaire on Page 2.

17 THE COURT: What is the difference as to that
18 paragraph between the parties on Page 2?

19 MR. DEVEREAUX: In Instruction 6, we're obviously
20 asking for medical records, and we've pared it down in a way
21 that I had identified earlier. Almost nothing from meso
22 claims, but for a diagnosis for the cancer claims only those
23 physical exams, we'll take A. As to the cancer claimants, we
24 ask for the lab results and diagnostic tests and medical
25 information related to their diagnosis. And then for part C,

1 the nonmalignants, we ask for the records related to their
2 diagnosis.

3 I think what the ACC proposes is that we be given,
4 if anything, that what we be given is not the x-ray but simply
5 the reading of the x-ray where their mass screener or whomever
6 has filled out and say I saw an x-ray rated 1-0. We don't get
7 the underlying information so that we can say, we don't think
8 that was a very good reading as a whole and sort of point out
9 the problems with the mass screening that goes on. So, I
10 think that the primary differences --

11 THE COURT: I'm going to permit the x-rays to be
12 produced. There are a lot of other things that are being
13 requested there. I guess we need to go through each one of
14 those. I think the x-rays are something that need to be
15 produced.

16 MR. FINCH: For the nonrelated claimants?

17 THE COURT: Right.

18 MR. FINCH: Let me start with the cancer claimants.
19 The way this is worded, it requires them to submit copies of
20 any and all physical exam results, pathology reports and
21 diagnostic tests or reports that support or conflict with
22 alleged diagnosis.

23 Any time I see the words "any and all" of anything,
24 I immediately think overbreadth and unlikely to lead to
25 admissible evidence. What if what they're looking for is a

1 statement of diagnosis and pathology report that says that
2 this person has lung cancer and there's another diagnosis that
3 says that it's somehow inconsistent with that, then I think
4 that given the Court's parameters on the earlier ruling, I
5 think that's acceptable, but once you start saying any and all
6 pathology reports that support your diagnosis, I mean, or any
7 and all physical exam results that support your diagnosis, the
8 cancer claimant might go to the doctor 20 times on physical
9 exam in the course of a year. Surely they're not asking for
10 every single physical exam the doctor has made because that
11 arguably supports their diagnosis every time they go back to
12 the doctor. If what they're looking for is just documents
13 sufficient to show that you have a diagnosis of cancer and
14 what type of cancer it is, then I think that would be
15 permissible. But for a typical cancer claim, you might have
16 boxes and boxes of medical records that are arguably in
17 support of your diagnosis. I don't really think that's what
18 Mr. Devereaux is looking for here. Perhaps it's just a
19 question of language choice. So that's my position on part B.

20 I can get to part C after Mr. Devereaux responds.

21 MR. DEVEREAUX: We don't say that aren't consistent
22 with the diagnosis. By support what we mean is the things
23 that the doctor relied upon when he made the diagnosis. Yes,
24 he takes an x-ray every six months for the next few years and
25 sees some remnants of the tumor, I guess that would or could

1 be consistent with his diagnosis, but it doesn't support the
2 additional diagnosis, and that's what we obviously are looking
3 for, the records that the doctor relied on and that support
4 the diagnosis of the cancer claimed.

5 MR. FINCH: I would suggest the language say that,
6 that the records that the doctor relied upon in making the
7 diagnosis.

8 THE COURT: I think that's a good suggestion. That
9 will be a clarification.

10 MR. DEVEREAUX: That's fine.

11 MR. FINCH: I think the same sort of --

12 THE COURT: "Conflict with" has to stay in, if
13 there's something in the record that has to conflict with that
14 diagnosis.

15 MR. FINCH: If there's something -- if there was
16 another medical report in the file that this person suddenly
17 doesn't have cancer, then, yes, I agree that would be
18 relevant. But I'm not sure what any and all records that
19 conflict with the alleged diagnosis would mean: There has to
20 be some sort of principle to that.

21 MR. DEVEREAUX: Regarding the potential cause of
22 the alleged diagnosis, obviously, our view is that lung
23 cancers, in the absence of asbestosis, are not asbestos
24 induced, and so we'll want chest x-ray and any indications
25 that spirometry or other sort of pulmonary function tests were

1 done which show or don't show --

2 THE COURT: They may not think it conflicts with
3 their diagnosis, so you may not be getting what you want, if
4 that's the case. Then what you should put in is what you're
5 looking for would be the chest x-rays. You need to be
6 specific about what you want because if I'm the recipient of
7 this, and I believe that your theory is incorrect and that
8 that's not a conflict, then you're not going to get any of
9 that.

10 MR. FINCH: Your Honor, there is a question that
11 asks about asbestosis. The typical lung cancer claim might
12 have multiple x-rays, so the real issue is do they allege that
13 they also have asbestosis? If the answer to that is no, then
14 I don't think you need x-rays from lung cancer.

15 MR. DEVEREAUX: If the answer is no, I agree.

16 THE COURT: How do we clarify that here then?

17 Let's move on. We'll come back and let you work on
18 this when we take our break. You can meet and confer and
19 we'll come up with language so you can get what you need
20 without creating confusion.

21 MR. FINCH: On part C, I think, again, it should be
22 limited to records on which the doctor relied to make the
23 diagnosis, not anything that supports or otherwise relates to
24 the alleged diagnosis.

25 MR. DEVEREAUX: Well, we've asked for a specific

1 set of records here.

2 THE COURT: You say "including but not limited to."
3 You want to limit it to those? I think you have to be
4 specific in a sense because if you say "otherwise relate to
5 the alleged diagnosis," you are going to get every treatment
6 note by any physician that may have seen this person.

7 MR. DEVEREAUX: What if we say "support" or
8 "conflict with"?

9 THE COURT: What would be relied upon? The same
10 language you had before, and the "conflict with." I think
11 what we said in Paragraph B, we're going to have some
12 specifics about what types of records you want, so I think if
13 you're specific and if your experts have looked at this and
14 say, if you see these, we'll be able to make the assessment
15 you need, that's what we should have for this purpose.

16 MR. DEVEREAUX: That are relied upon or conflict
17 with the alleged diagnosis, including but not limited to --

18 THE COURT: You're going to work with the "conflict
19 with." I thought what we were going to do was not go with the
20 word conflict because that's something that is judgmental, but
21 you're going to have a specific report or statement from a
22 doctor that you want.

23 MR. FINCH: Your Honor --

24 THE COURT: Am I not understanding that correctly?

25 MR. FINCH: I hate to agree with Mr. Devereaux on

1 lots of things, but on this one, I think if you start trying
2 to define it in too much detail, it sort of breaks down the
3 process. Perhaps the best we can do is documents upon which
4 you relied for your diagnosis or which conflict with the
5 diagnosis, and leave it at that.

6 MR. DEVEREAUX: Well, including but not limited to.

7 MR. FINCH: Including but not limited to that sort
8 of material.

9 THE COURT: All right. Then we'll go on with that.

10 Are we done with Paragraph C?

11 MR. FINCH: I believe it is likely that may be
12 subject to objections from people who are required to submit
13 x-rays on burden or viability grounds, but I won't know until
14 I know who gets the questionnaires, how easy it is for them to
15 access the x-rays. If they are already in possession of
16 another defendant they're going to trial against in state
17 court in California, then it may not be available to USG, so
18 that's an individualized, particularized call that I'm not in
19 a position to make.

20 THE COURT: They'll have to contact the debtors'
21 counsel and say what they can produce and what they can't
22 produce, and if there's a disagreement, then we'll have to
23 come here. Hopefully, most of them will be worked out. If
24 it's not something that is possible to produce, or if there's
25 a financial burden, you have to work out the financial

1 ramifications of getting that information.

2 Paragraph 7.

3 MR. DEVEREAUX: We ask if the injured party or
4 personal representative of claimant has responded to
5 interrogatories or given a deposition, we ask that it be
6 produced.

7 THE COURT: You're going to pay for this?

8 MR. DEVEREAUX: Correct.

9 MR. FINCH: We don't object. Given the Court's
10 ruling on the documents, if they're interrogatories or
11 depositions, as long as the debtor is going to pay people to
12 copy that, we don't object.

13 THE COURT: Is it clear where it says that they
14 will be paid for?

15 MR. DEVEREAUX: In No. 10, which we talked about
16 earlier about making photocopies, Instruction 10.

17 THE COURT: You may want to cross reference that
18 where you maybe highlight in bold some of the information in
19 No. 10.

20 MR. DEVEREAUX: We'll do that.

21 Instruction No. 8 relates to situations where the
22 claimant says -- we ask specifically, do you rely upon
23 testimony of a co-worker in order to identify US Gypsum's
24 products as to ones which you were exposed. If they answer
25 that question yes, and we ask for that co-worker's

1 deposition --

2 MR. FINCH: Your Honor, this gets into an area I
3 was highlighting earlier. The plaintiff's counsel may not
4 have decided what evidence he would put on as to USG exposure
5 and, therefore, there should be a box that says "have not
6 decided" or "don't know yet" on the questionnaire as to
7 whether or not they're going to rely -- if they say yes, I'm
8 going to rely on co-worker and it's John Smith.

9 THE COURT: That's what I think this is asking for.

10 MR. FINCH: There has to be an instruction or
11 provision that says, if you haven't made that determination,
12 so state.

13 MR. DEVEREAUX: Well, they sued US Gypsum, so they
14 had some basis, and what we ask is, are you relying on
15 personal recollection, or are you relying on other bases? And
16 then we ask specifically, because this was part of the meet
17 and confer, do you claim to rely on a co-worker? If that's
18 the basis --

19 THE COURT: They have to make a determination if
20 they're going to rely on a co-worker or not. If they can't
21 make it, then they'll have to contact the debtors and they'll
22 have to resolve that on an individual basis.

23 MR. FINCH: Your Honor, I guess --

24 THE COURT: In any discovery in federal court, if
25 you are complying with Rule 26, you have to identify any

1 person that may have evidence relevant to your claim, which
2 would require you to identify a co-worker, if you believe that
3 co-worker had information that was going to support your
4 claim, so it's really no different than asking for that type
5 of thing.

6 MR. FINCH: Discovery from USG or other sources,
7 you may not have that information. The person may have come
8 in --

9 THE COURT: If they don't have it, they don't have
10 it. This is not a merits determination on their particular
11 claim, and if you believe that because of the time frame of
12 the relevant claim that that may have been produced, that they
13 won't have obtained that at that point in time, that will go
14 to whether the sampling is flawed and/or go to the weight.

15 MR. FINCH: The weight of the admissibility; so
16 people can say, I have not made that determination yet?

17 THE COURT: You can ask them that on your side and
18 then attack the same plan and the responses for that purpose.
19 But if they're relying on somebody, they have to disclose that
20 person. And if that person has been deposed, they'll have to
21 produce the deposition, subject to the debtor paying the cost
22 of the copying.

23 I think that's it, with the one clarification that
24 you're going to make on Paragraph 10.

25 Now, there is a need for confidentiality of the

1 Social Security number and the courts have been very careful
2 about protecting those personal identifiers. So I would like
3 on part one, I think it comes up again later in the
4 questionnaire, to put an asterisk by the Social Security
5 number and note on the form that this information will be held
6 in strict confidence by the debtor and any party to whom it is
7 disclosed. And there's going to have to be a confidentiality
8 agreement that is acceptable to the parties and presented to
9 the Court. But I do want the claimants to know if they're
10 filling this out, that information is going to be held
11 confidential.

12 MR. DEVEREAUX: We'll do that, Your Honor.

13 THE COURT: I don't know that any of the other
14 information rises to the level of needing that type of
15 protection.

16 MR. FINCH: The Social Security work history would,
17 Your Honor.

18 THE COURT: Yes, that would, too, you're correct.

19 MR. FINCH: The confidentiality order has to
20 provide that to the extent that this type of information is
21 submitted to parties, the parties can only use it for purposes
22 of this bankruptcy case and can't use it for purposes of any
23 other case or for general purposes. I mean some of the
24 parties to this bankruptcy case are large commercial
25 institutions which I'm sure would love to get lists of people

1 with Social Security numbers to send all kinds of junk mail
2 to, if for nothing else, so there has to be some kind of
3 limited order in place.

4 MR. DEVEREAUX: During the meet and confer, we
5 discussed this and all parties agreed that they wanted an
6 onerous confidential provision. It is something that would be
7 absolutely ironclad.

8 THE COURT: I don't want this to go out until the
9 confidentiality is agreed to. When will you have that? Do
10 you want to send this out on October 20th? I'm going to need
11 that confidentiality agreement here early next week.

12 MR. DEVEREAUX: I can promise a draft early next
13 week. I can't promise an agreement. There have been four
14 months we have been working on one substantive consolidation
15 case before Judge Fitzgerald.

16 THE COURT: It's going to come out one way or the
17 other very quickly, so you're going to have to have that draft
18 of the confidentiality agreement to the other parties by the
19 11th of October, which is next Tuesday. It's after the
20 holiday. You're going to have to meet and confer on that. If
21 you can all agree on that, I need to have it filed with this
22 Court by October 14th. And if you can't agree, we'll have to
23 have a conference on whatever the draft is at that stage and
24 if you have dual drafts, I'll pick one of them.

25 MR. FINCH: May I suggest that we -- I think we'd